

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (ST) NO.30669 OF 2017
WITH
CIVIL APPLICATION (ST) NO.30670 OF 2017
IN
APPEAL FROM ORDER (ST) NO.30669 OF 2017

Govind Gabha Patel & Anr.

...Appellants

Versus

Krishna Collection,

Thr. Propt. Dharamshi C. Patel.

...Respondent

Mr. Mohan Pillai I/by Mrinal M. Pillai for the Appellants.

Mr. Prasad S. Dani, Sr.Counsel a/w.Mr. Amogh Singh I/by Mr. Jeet Gandhi for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 18TH SEPTEMBER, 2018.

P.C. :

1. Heard learned counsel for the Appellants and the Respondent.
2. This appeal takes an exception to the order dated 11.10.2017 passed by the City Civil Court, Dindoshi, Mumbai, whereby the Notice of Motion No.1906/2017 filed in S.C.Suit No.1644 of 2017 is made absolute in terms of prayer clause (a) therein.
3. The said Notice of Motion was taken out by the respondent in his S.C.Suit No.1644 of 2017, seeking the relief of temporary injunction restraining the appellants, who are defendants before the Trial Court, from entering or coming upon the suit premises, being Shop No.1, 59/B, A.V.Gomes Chawl, Old Khar, Jn. of 33rd & 6th Road, TPS III, Khar (West), Mumbai 400 052 or cause

any obstruction or interference or inconvenience to the respondents carrying on business therefrom pending the hearing and final disposal of the suit.

4. As per the case of respondent, he is the tenant in the suit premises and is running therein the business in the name of Ms. Krishna Collection as a proprietor. According to him, initially it was a partnership firm. Subsequently when one of the partner of the firm retired, respondent continued the business as a sole proprietor of the firm. The electricity and telephone bills of the said business stand in his name. It is his grievance that, appellant, being his brother, is illegally trying to claim the right over the suit premises though he is having absolutely no concern with the said premises and therefore, he should be restrained from causing obstruction to his possession in the suit premises.

5. The appellant has resisted this Notice of Motion contending *inter alia* that he is running in the suit premises the business in the name of M/s. Krishna Collection alongwith his own business namely "GRACE" as wholesalers of ladies western outfits. As per his contention, though 'Krishna Collection' is the business of his sibling, which was conducted in the suit premises for quite a few years, till it was discontinued w.e.f.01.07.2016. However, his business in the name of GRACE continued from the very same shop. He has admitted that the shop premises is a tenanted property and the tenancy stands in the name of Krishna Collections and his brother i.e. the respondent is the proprietor of the said business. Further according to him, since past July 2016, there was no business activities of the respondent in the shop premises and he is alone using

the said shop premises for the purpose of his business in the name of GRACE. He is further relied upon the oral understanding between the parties, on the basis of which, he was allowed to remain in possession of the suit premises. He has further contended that he was paying the electricity and telephone charges since beginning and to support his contention, he has also filed on record those original telephone and electricity bills.

6. The Trial Court was after considering the submissions advanced by both the parties, pleased to hold that the appellant is not having a single document to show in which legal character or capacity he is in possession of the suit premises. The Trial Court, therefore, after relying upon the judgment of the Apex Court in the case of *Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack de Sequeria (Dead) through Lrs.* has held that the caretaker, watchman or servant could never acquire interest in the property, irrespective of their long possession; therefore, their possession cannot be protected by the order of temporary injunction. The Trial Court accordingly allowed the respondent's Notice of Motion and restrained the appellants from entering into possession of the suit premises or causing obstruction to respondent's possession in the suit premises till the decision of the suit.

7. This order of Trial Court is challenged in the present appeal. Learned counsel for the appellants has pointed out various documents like bills of electricity and telephone, showing that all along it is the appellant who is paying the electricity and telephone bills. His mobile number is also appearing

in the said bills. The statement of bank accounts of the business of Krishna Collection is also produced on record to show that the said business was continued only upto June 2016. According to the appellant, since then he is in exclusive possession therein. To support this submission, the original bills of the said business upto June 2016 alongwith photographs have also been produced on record. Thus, according to the learned counsel for the appellant, the appellant is very much in possession of the suit premises, and therefore, respondent cannot restrain him from doing business therein. It is the submission of the learned counsel for the appellants that, it was not proper on the part of the Trial Court to allow the Notice of Motion filed by the respondent because at the interim stage, it is not expected from the appellant to prove his legal character or the capacity in which he is in possession. It is submitted that once the documentary evidence produced on record shows the possession of the appellant over the suit premises, then such possession is required to be protected till the decision of the suit or at least till the due process of law is followed. It is submitted that on the strength of the orders of interim injunction, the respondent is trying to dispossess the appellant from the suit premises, and therefore, the impugned order passed by the Trial Court is required to be quash and set aside.

8. Per contra, learned counsel for the respondents has supported the impugned order by pointing out that even in this appeal or at this stage also, the appellant has not shown in which legal character or capacity he is in

possession of the suit premises, apart from the fact that he is not at all in possession, but it is the respondent who is in possession till today. The electricity and telephone bills are in the name of Krishna Collection. Merely because the appellant has paid those bills, the appellant cannot claim that he was the custodian of the business or he is in exclusive possession thereof. It is submitted by the learned counsel for the respondent that even as per own case of the appellant, he is the custodian of the business, therefore, his character or capacity, cannot be any more than that of an agent or the caretaker. According to the learned counsel for the respondents, therefore, the Trial Court has rightly placed reliance the judgment of the *Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack de Sequeria (Dead) through Lrs.* to hold that the caretaker or an agent for that matter, cannot have any right to remain in possession of the suit premises, as such person cannot have any independent right, character to hold on the possession. According to the learned counsel for the respondents, therefore, the impugned order passed by the Trial Court does not call for any interference, as that is the possible view, which needs to be taken otherwise also from the documents produced on record.

9. At this stage, in my considered opinion, what is essentially to be looked into the matter is whether *prima face* appellant proves that he is in possession of the suit premises. In this respect, apart from the telephone and electricity bills, which are produced on record by the appellant, there are also the affidavits of about five employees working in the suit shop, who have

categorically stated on oath that they are working in the said business since several years together; initially the two businesses in the name of Krishna Collection and GRACE were run in the shop premises. According to them, Krishna Collection stopped its activities w.e.f.01.07.2016. However, the business of GRACE continued and is continuing under the control, supervision and ownership of the appellant therein. According to their statement on oath, during the subsistence of their employment over the years, they had no occasion to take orders and/or their work ever being supervised and controlled by any other person than the appellant herein, whether the said business is of Krishna Collections or GRACE.

10. Their affidavit further show that the respondent and his brother were on visiting terms and hence Respondent at times used to come to the shop to pay social visit to his elder brother, but they had no occasion to work under or serve in the employment of any person be it either the respondent or his son. They have served or rendered their services only to the appellant.

11. This affidavit of five employees, who are working in the suit business has remained unchallenged on record and this affidavit categorically make out prima facie at this stage to prove that the appellant is in possession of the shop premises and he is running his own business therein in the name of GRACE and for some years also the business of Krishna Collection with his brother i.e. the respondent.

12. Therefore, at this stage, it cannot be said that the appellant is a rank

trespasser and has no concern at all with the shop premises. Considering his long standing possession of the suit shop and the business of Krishna Collection run therein alongwith his own business in the name of GRACE conducted there, if the order of interim injunction granted by the Trial Court is allowed to remain on record, it will be as good as ousting the appellant from the possession of the suit shop at this interim stage itself and that too, without following due process of law. The order of the Trial Court is necessarily restraining the appellant from entering into the suit shop though on the face of it also it is *prima facie* proved that the appellant is in the possession of the suit shop. In which capacity or the legal character he is in possessing thereof can be proved at the time of trial, however, at this stage the appellant's possession needs to be protected.

13. It may be true that the possession of a caretaker may not be protected and in his favour the relief of interim injunction may not be granted as held by the Apex Court in the case of *Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack de Sequeria (Dead) through Lrs.*, but this is a reverse case in the sense that Respondent, who is not in possession of the suit shop is trying to dispossess the appellant by getting such order of temporary injunction, restraining the appellant from entering in the suit premises or from carrying out business therein. Such order of temporary injunction cannot be called as just, legal and correct because no one can be dispossessed without due process of law by adopting such ingenious drafting or by seeking for the relief which

may appear to be innocuous but may ultimately dispossess the person in possession of the shop premises. The impugned order, therefore, passed by the Trial Court cannot be sustained in law. Hence, the appeal is allowed. The impugned order passed by the Trial Court is quashed and set aside.

14. In view of disposal of the appeal, pending Civil Application therein no more survives. Hence, stands disposed off.

[DR. SHALINI PHANSALKAR-JOSHI, J.]